

OFFICE OF SPECIAL MASTERS

No. 04-1332V

(Filed: November 2, 2004)

Geina SILET,

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Petitioners,

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To Be Published

v.

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SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

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Respondent.

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Grenville Pridham, Esq., Las Vegas, Nevada, for Petitioners.
Gabrielle M. Fielding, Esq., United States Department of Justice, Washington, D.C., for Respondent.

DISMISSAL DECISION

ABELL, Special Master:

BACKGROUND

On 17 August 2004, Petitioner filed an action seeking an award under the National Childhood Vaccine Injury Act of 1986 (“Vaccine Act” or “Act”).¹ Petitioner alleges that her injuries were caused in fact by a Hepatitis A vaccination administered on 17 August 2001. Petition at 1-2. According to her medical records, Petitioner received no other vaccination on that date. Petitioner’s Exhibit 5. The dispositive issue in this case is whether Hepatitis A is a vaccine set forth in the Vaccine Injury Table (“Table”). As it is not, this case is hereby dismissed without prejudice.

¹ The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq.* (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

DISCUSSION

Petitioner does not argue that Hepatitis A is on the Table. Rather, Petitioner claims that “the fact that a vaccine and injury are not specifically listed on the Table is not a jurisdictional basis to dismiss a claim.” Pet. Response at 3 (citations omitted). Petitioner further argues, “It is clear that the Table was only intended to be a list of the most common and problematic vaccines to give petitioners a presumption that a vaccination did in fact cause their injury without the need to present medical evidence.” Pet. Response at 4.

Petitioner is half-right. The Court may hear petitions involving *injuries* that are not specifically on the Table where those injuries are allegedly related to a Table vaccine. As this Court has previously stated, petitioners can prove entitlement to compensation under the Act via two routes. First, they can prove entitlement if they suffered, within the statutorily prescribed time period, an injury or condition listed in the Vaccine Injury Table (otherwise known as a “Table injury”). § 11(c)(1)(C)(i). If petitioner proves by a preponderance of the evidence, that she suffered a Table injury, she is entitled to a legal presumption that the vaccine in question caused the injury. § 13(a)(1)(A). However, if a petitioner is unable to demonstrate a Table injury, she may prove by a preponderance of the evidence that the vaccine in question caused-in-fact the alleged injury. §§ 11(c)(1)(C)(ii)(I) and (II).

However, the Court may not hear petitions involving *vaccines* that are not listed on the Table. § 11(c)(1)(A). The Act requires that, in order to bring a petition, the person who suffered the alleged vaccine-related injury must have “received a vaccine set forth in the Vaccine Injury Table.” § 11(c)(1)(A). Though sympathetic toward Petitioner and her injuries, this Court is only authorized to hear cases involving vaccines that are listed on the Table. *Id.* See also, *Charette v. Secretary of HHS*, 33 Fed. Cl. 488 (1995) (typhoid vaccine is not covered by the Vaccine Act); *Finley v. HHS*, No. 04-874V, 2004 WL 2059490 (Fed. Cl. Spec. Mstr. Aug. 24, 2004) (Pneumovax 23 not covered under the Act); *Brausewetter v. Secretary of HHS*, No. 99-278V, 1999 WL 562700 (Fed. Cl. Spec. Mstr. July 16, 1999) (tetanus antitoxin vaccine not covered under the Table); *Miller v. Secretary of HHS*, No. 90-1123V, 1993 WL 214444 (Fed. Cl. Spec. Mstr. June 4, 1993) (diphtheria toxoid not covered under the Program); *Dover v. Secretary of HHS*, No. 90-2299V, 1991 WL 164496 (Fed. Cl. Spec. Mstr. Aug. 8, 1991) (typhoid-paratyphoid vaccine); *Dalton v. Secretary of HHS*, No. 90-2785V, 1991 WL 146245 (Fed. Cl. Spec. Mstr. July 18, 1991) (influenza vaccine not set forth in Vaccine Injury Table).

Currently, Hepatitis A is not on the Vaccine Table.² This Court has no power to hear cases

² However, Congress recently passed, and the President signed into law, the American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 889, 118 STAT. 1418 (Slip Copy, Oct. 22, 2004), which creates an excise tax on the administration of the Hepatitis A vaccine. Hence, Petitioners may soon be able to file another petition, § 16 (b), provided that the Secretary of Health and Human Services first publishes a “notice of coverage.” 42 C.F.R. § 100.3(a)(XIV) (2004). Therefore, this petition is dismissed without prejudice pending the subsequent change to the Table.

involving vaccines that are not covered by the Table. Simply stated, this Court is the wrong venue for Petitioners' claim. As the Supreme Court has cautioned on several occasions, "the 'proper theater' *** 'is the halls of Congress.'" *Keene Corp. v. United States*, 113 S.Ct. 2035, 2045 (1993) (citing *Smoot's Case*, 15 Wall 36, 45 (1873)). The court enjoys no "liberty to add an exception ... [or] to remove apparent hardship." *Id.*

CONCLUSION

Accordingly, this petition is **DISMISSED** without prejudice. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Richard B. Abell
Special Master